Rosli bin Hamid v Public Prosecutor and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS N-05–155 OF 2010 AND N-05–156 OF 2010
SULONG MATJERAIE, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA
26 DECEMBER 2012

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Criminal Procedure — Accomplice — Whether witness an accomplice — Whether evidence safe to rely upon — Whether accomplice's evidence independently corroborated by other eye-witness testimony — Whether duty of defence to apply to recall witness or adduce new evidence if charge amended — Whether trial judge not obliged to advise defence counsel of right to recall witnesses — Criminal Procedure Code s 162

D

The appellants in the instant appeals, Rosli bin Hamid ('Rosli') and Kamal Ariffin bin Abdul Hamid Samy ('Kamal') appealed against their conviction and sentence by the High Court for jointly murdering a man ('the deceased') for the reason he had allegedly molested their sister. The prosecution had adduced evidence to show the appellants had assaulted the deceased first with their bare hands and feet and thereafter with a piece of wood for about two hours. Following the assault the deceased was admitted to hospital comatose and he subsequently died from complications due to his head injuries. Among those who testified for the prosecution was SP4, a friend of the deceased, who had witnessed the entire assault. He, however, claimed he did not intervene to help the deceased for fear he would also be assaulted. The appellants, inter alia, argued that SP4's testimony was not credible and reliable because he was an accomplice. SP4 had admitted during cross-examination that before the appellants had arrived at the crime scene and assaulted the deceased, he had slapped the deceased for accusing him (SP4) of having molested the appellants' sister. The appellants also argued that they had been prejudiced by the trial judge's decision to not allow the defence to recall witnesses after the prosecution was allowed to amend the charge after closing its case.

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Held, dismissing the appeals and affirming the convictions and sentences:

(1) The trial judge did not err in relying upon SP4's testimony and for not rejecting it in toto. There was more than sufficient independent material corroboration to support the conclusion that SP4's testimony was credible and safe to rely upon. In addition to SP4's evidence, there was the testimony of two other eye-witnesses, SP5 and SP10 (see para 20).

I

(2) Under s 162 of the Criminal Procedure Code the defence had to apply to recall and examine any witness, or call any further material evidence, with

reference to any amendment to the charge. The notes of proceedings did not show any such application being made and refused. Instead, after defence counsel's objection that the amendment was prejudicial to the defence was dismissed, counsel proceeded, after the amendment, to make submissions at the end of the prosecution's case. The trial judge was not obliged to advise defence counsel that they had the right to recall witnesses or call further witnesses (see paras 24, 26–27).

(3) No explanation was given as to how the amendment to the charge had prejudiced the appellants. There was nothing put before the court, not only for the Judge to consider, but also for the prosecution to answer, as to whether there was in fact prejudice to the appellants. There was therefore no error on the trial judge's part in rejecting the objection (see para 28).

(4) The evidence showed it was not one of them but both the appellants that had hit the deceased with a piece of wood causing the head injuries that led to his death. The High Court did not err in law, principle or finding of fact in deciding that both appellants were guilty as charged and in convicting and sentencing them accordingly (see paras 40–41).

[Bahasa Malaysia summary

Perayu-perayu dalam rayuan ini, Rosli bin Hamid ('Rosli') dan Kamal Ariffin bin Abdul Hamid Samy ('Kamal') merayu terhadap sabitan dan hukuman oleh Mahkamah Tinggi untuk pembunuhan bersama seorang lelaki (si mati) atas alasan si mati telah mencabul kehormatan adik perempuan mereka. Pihak pendakwaan telah mengemukakan keterangan untuk menunjukkan perayu-perayu telah menyerang si mati terlebih dahulu dengan tangan dan kaki mereka dan kemudiannya dengan sebatang kayu selama dua jam. Berikutan serangan tersebut si mati dimasukkan ke hospital dalam keadaan koma dan kemudiannya meninggal dunia akibat komplikasi kecederaan di kepalanya. Antara mereka yang memberi keterangan untuk pihak pendakwaan SP4, kawan si mati, yang menyaksikan keseluruhan serangan tersebut. Dia walau bagaimanapun mendakwa yang dia tidak campur tangan untuk membantu si mati kerana takut dia juga akan diserang. Perayu-perayu, antara lain, berhujah bahawa testimoni tidak boleh dipercayai dan tidak boleh digunakan kerana dia adalah rakan subahat. SP4 telah mengaku semasa pemeriksaan balas bahawa sebelum perayu-perayu tiba di tempat jenayah dan menyerang si mati, dia telah menampar si mati kerana menuduh dia (SP4) mencabul kehormatan adik perempuan perayu-perayu. Perayu-perayu juga berhujah bahawa mereka telah diprejudiskan oleh keputusan hakim bicara untuk tidak membenarkan pembelaan untuk memanggil balik saksi-saksi selepas pihak pendakwaan dibenarkan meminda tuduhan selepas penutupan kesnya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraan tidak tersilap dalam menggunakan testimoni SP4

dan untuk tidak menolaknya sepenuhnya. Terdapat sokongan material bebas yang mencukupi untuk menyokong kesimpulan bahawa testimoni SP4 adalah boleh dipercayai dan selamat untuk gunakan. Tambahan kepada keterangan SP4 terdapat testimoni dua saksi yang lain, SP5 dan SP10 (lihat perenggan 20).

(2) Di bawah s 162 Kanun Acara Jenayah pihak pembelaan terpaksa memohon untuk memanggil balik dan memeriksa mana-mana saksi, atau untuk memanggil apa-apa keterangan material selanjutnya, dengan rujukan kepada mana-mana pindaan kepada tuduhan. Nota prosiding tidak menunjukkan apa-apa permohonan sedemikian dibuat dan ditolak. Sebaliknya, selepas bantahan peguam pembelaan bahawa pindaan adalah prejudis kepada pembelaan ditolak, peguam meneruskan, selepas pindaan, untuk membuat hujahan di akhir kes pendakwaan. Hakim bicara tidak bertanggungjawab untuk menasihatkan peguam pembela bahawa mereka mempunyai hak untuk memanggil balik ssaksi-saksi atau memanggil saksi-saksi selanjutnya (lihat perenggan 24, 26–27).

(3) Tiada penjelasan diberikan mengapa pindaan kepada tuduhan telah memprejudiskan perayu-perayu. Tidak terdapat apa-apa yang dikemukakan di hadapan mahkamah, bukan sahaja untuk hakim mempertimbangkan, tetapi juga untuk pihak pendakwaan menjawab, terhadap sama ada sebenarnya terdapat prejudis kepada perayu-perayu. Oleh itu tidak terdapat kesilapan oleh hakim bicara dalam menolak bantahan tersebut (lihat perenggan 28).

(4) Keterangan menunjukkan bukan salah seorang daripada mereka tetapi kedua-dua perayu yang memukul si mati dengan sebatang kayu menyebabkan kecederaan kepala yang membawa kepada kematiannya. Mahkamah Tinggi tidak tersilap dari segi undang-undang, prinsip atau dapatan fakta dalam memutuskan bahawa kedua-dua perayu adalah salah seperti yang dituduh dan dalam menyabit dan menghukum mereka (lihat perenggan 40–41).]

Notes

For cases on whether witness an accomplice, see 5(1) *Mallal's Digest* (2012, Reissue) paras 18–23.

Cases referred to

Azhar bin Che Wil v PP [2010] 6 MLJ 22; [2010] 8 CLJ 905, FC (refd)

Harun bin Abdullah v PP [1998] 3 MLJ 1, CA (refd)

Hj Maamor bin Hj Abdul Manap v PP [2002] 6 MLJ 668; [2003] 1 CLJ 370, HC (refd)

Khalid Panjang & Ors v PP (No 2) [1964] 1 MLJ 108; [1964] 1 LNS 60, FC (refd)

Kuppusamy v PP [1948] 1 MLJ 25 (distd)
Mohamed Yatin bin Abu Bakar v PP [1950] 1 MLJ 57; [1949] 1 LNS 50 (refd)
Mohammad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 7 LNS 654, CA (refd)

Legislation referred to

Criminal Procedure Code ss 162, 422
Penal Code ss 34, 299, 299 Explanation 2, 300, 300 Exception 1, 300(c), 302

Appeal from: Criminal Trial No 45–2 of 2007 (High Court, Seremban)

Sukhaimi bin Mashud (Karthig Shan) for the appellants.
Mohamad Abazafree bin Mohd Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellants Rosli bin Hamid ('Rosli') and Kamal Ariffin bin Abdul Hamid Samy ('Kamal') were both charged with the murder of the victim Mohd Khairul Nizam bin Mohd Yusof ('the victim') with joint intention as follows:

> Bahawa kamu bersama-sama pada 5.9.2006 di antara jam lebih kurang 8.30 malam hingga jam 11.40 malam di hadapan Wisma Bella, Taman Sri Serting, Bandar Seri Jempol, di dalam Daerah Jempol, dalam negeri, Negeri Sembilan telah membunuh dengan menyebabkan kematian ke atas MOHD KHAIRUL NIZAM BIN MD. YUSOF, KP: 821120-05-5611, oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dibaca bersama dengan Seksyen 34 Kanun yang sama.

[2] At the end of the trial, both had been found guilty as charged, and were convicted and sentenced in accordance with s 302 of the Penal Code read with s 34 thereof. Rosli and Kamal appealed to this court. After hearing the parties, we dismissed their appeals and affirmed the conviction and sentence passed by the High Court.

THE PROSECUTION CASE

[3] The prosecution case was that Kamal had brought the victim to the scene of the crime where Kamal had hit and kicked the victim upon the excuse that the victim had admitted to molesting Kamal's sister. Then Rosli came and did the same. Rosli was seen to leave the scene and came back with a piece of wood which he used to beat the victim again and again on the head and body, while

Kamal beat the victim with his hands. Kamal then took the piece of wood from Rosli and beat the victim with it. This continued for some time.

[4] It was the prosecution case that after the victim was brought home where he told his brother he was involved in a road accident, his father had sent him to the hospital where he was warded in a comatose state for a number of days before he died. The cause of death was complications from the head injuries. The prosecution relied upon Explanation 2 of s 299 of the Penal Code:

> s 299 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> …
>
> Explanation 2 — Where death is cause by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

[5] The prosecution relied upon the following provisions of the Penal Code:

(a) section 299: *Whoever causes death by doing an act* with the intention of causing death, or *with the intention of causing such bodily injury as is likely to cause death*, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide;

(b) section 300(c): except in the cases hereinafter excepted, *culpable homicide is murder* —

> *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*, or
>
> …

[6] The prosecution conceded there was the element of provocation. However, it was the prosecution case that on the facts *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25 was distinguishable. It was the prosecution case that Exception 1 of s 300 of the Penal Code was not applicable:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

THE PROSECUTION EVIDENCE

[7] The prosecution called 11 witnesses.

[8] SP1 Md Yusof bin Ibrahim, a lorry driver, is the father of the victim Mohd Khairul Nizam. He identified that the person in the photograph at ID4 was Mohd Khairul Nizam.

[9] SP2 Dr Hans Alexander Mahendran was the medical doctor who attended to the deceased. SP3 Dr Sharifah Safoorah bt Syed Alwee Al Aidrus was the forensic pathologist who conducted the post mortem on Mohd Khairul Nizam. She identified the person in the photograph ID4 as that of the person upon whom she conducted the post-mortem.

[10] SP4 Zul'izuan bin Jasmin, a friend of Mohd Khairul Nizam. He identified the person in the photograph as Mohd Khairul Nizam. He was an eyewitness to the events of the incident. SP5 Konst Hufaizah bin Sharifuddin, then a burger seller, was also an eyewitness. SP10 Alif Akhmar bin Ahmad was another eyewitness.

[11] SP9 exh Insp Norihan bt Yusof was the investigating officer who after questioning Rosli had proceeded to the crime scene and found the piece of wood and blood stains on the floor and wall of the dewan in Kampung Baru Serting. She handed over the piece of wood to SP11. SP11 C/Inspector Labang ak Manggi was an investigating officer at IPD Jempol who went to the crime scene at Wisma Belia, Taman Seri Serting, Bandar Seri Jempol. He brought SP8. He found bloodstains on the wall, the floor and beside the drain. He arrested both accuseds and SP4. He received the piece of wood which he marked E1 from SP9. He sent E1 (exh P11), blood sample from the wall (E4 exh P19), blood sample from the floor (E3 exh P17) and blood beside the drain (E2 exh P15), the deceased's blood sample (E7 exh P13), and shirt and trousers of Kamal (exh P23A–B) and Rosli (exh P21A–B) to the government chemist Encik Bakhtiar bin Kasim at the Chemistry Department.

[12] SP7 D/Kpl RF/103506 Suhaimi bin Mohamed, a police photographer, took photographs of the crime scene. SP8 Koperal Mohd Azmi bin Talib, also a police photographer, took photographs at the post-mortem. SP8 took the photograph ID4 (exh P4).

[13] SP6 Insp Mohd Azman bin Zaimi was the investigating officer who served a copy of the chemist's report (PJ) FOR 7757–06–0 and the medical reports by Dr See Mee Hoong from Kuala Pilah Hospital upon the two accused persons.

THE GROUNDS OF APPEAL

[14] Three grounds of appeal were pursued:

(a) SP4 is not a credible witness;

(b) the trial did not follow procedure; and

(c) the defence was not fully considered.

CREDIBILITY OF SP4

[15] It was submitted that the testimony of SP4 was not credible because not only was he under arrest as a suspect for 12 days, but he was a participant in the crime, and there were contradictions in his testimony.

[16] From the evidence of SP4 himself, he was a participant in the crime, albeit according to his version he was a minor participant. We examined this evidence. At RR66 he had said:

> Simati dibelasah oleh OKT1 dan OKT2 lebih kurang 2 jam lebih. Saya tak ingat sama ada orang lain memukul simati. Saya sendiri tidak pukul simati. Saya tidak membantu simati sebab takut kepada OKT1 dan OKT2 pukul saya balik. Saya tak ingat sebab apa saya membuat anggapan begitu. …

[17] Under cross-examination at RR76, he was asked:

S: Awak kata OKT1 sampai selepas 45 minit. Sebelum OKT1 datang awak pukul dia dengan tangan.

J: Saya lempang simati sekali.

S: Bila kamu lempang simati.

J: Selepas lebih dari 1 jam sampai baru lempang dia.

S: Tadi awak kata semasa disoal oleh Timbalan Pendakwa Raya kamu kata kamu tidak pukul dia.

J: Ada lempang.

S: Kenapa awak lempang dia.

J: Sebab simati menuduh saya mencabul adik OKT1 dan OKT2.

S: Bila dia tuduh kamu.

J: Di rumah saya. Saya dituduh lagi di tempat kejadian.

S: Selepas berapa lama berada di situ ia tuduh awak lagi.

J: Tak ingat Simati lawan biasa sahaja.

S: Kamu melihat tidak semua yang telah berlaku di tempat kejadian.

J: Ya.

[18] The rule as to accomplice evidence arises out of the fact there are various

reasons why an accomplice gives testimony against his partners in crime, some warranting rejection of his testimony, yet others not necessarily. There are, on the other hand, only too many cases where accomplice evidence may be the only available evidence. Hence, it is a long established rule that it is examined with utmost caution, and material corroboration from independent evidence is sought before reliance can be placed upon it to convict an accused on such accomplice evidence. See *Khalid Panjang & Ors v Public Prosecutor (No 2)* [1964] 1 MLJ 108; [1964] 1 LNS 60 (FC).

[19] In this case, in re-examination, SP4 said 'Saya lempang simati tidak kuat sangat'. He maintained his answer during cross-examination that he slapped the deceased. The record of proceedings show that the testimony that he slapped the deceased came as an answer to the defence suggestion that he hit the deceased with his hand. We find from the foregoing that although he sought to downplay his involvement as against the prosecution, he was direct and candid in his answer to the defence that he hit the deceased with his hand. To that, he answered he did so with a slap, and gave the reason that he was accused of having molested the accused's sister. This was not challenged. It is not, therefore, a case of an accomplice passing all the blame to the accuseds for it is not the defence case that SP4 was the perpetrator of the cause of death.

[20] In addition, there was the testimony of SP5 and SP10. Nowhere was there made at any time the suggestion that SP4 was the sole perpetrator. There was more than sufficient independent material corroboration that supports the conclusion that the testimony of SP4 is credible and reliable and is safe to rely upon it. In the circumstances, we find the learned judge did not err in placing reliance upon the testimony of SP4 and not rejecting his testimony in toto.

TRIAL PROCEDURE

[21] It was submitted that the learned trial judge applied wrong procedure when he allowed the prosecution to amend the charge after the prosecution case had closed and did not allow the defence to recall witnesses.

[22] The original charge upon which Kamal and Rosli were tried appears at RR150. The amended charge appears at RR179. The difference is with regard to inclusion of language pertaining to s 34 of the Penal Code. The precise difference is that the consideration is no longer of each accused's intention or knowledge.

[23] The prosecution had closed its case on 29 December 2009 and offered

remaining witnesses to the defence. On 30 December 2009, and before the defence case commenced, the prosecution applied to amend the charge. The objection then made was:

> Peguam: Walaupun Seksyen 158 CPC memberikan budi bicara kepada Mahkamah namun dalam kes ini pindaan itu memprejudiskan OKT-OKT.

[24] The right to recall witnesses is provided under s 162 of the Criminal Procedure Code:

> Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[25] It is observed that s 162 provides that the accused shall be allowed to recall or re-summon and examine with reference to such alteration or addition, any witness who may have been examined and may also call further evidence which may be material. It clearly calls for the defence to make an application and the court cannot refuse. Hence, in *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668; [2003] 1 CLJ 370 (HC). Augustine Paul J (as he then was) had this to say of s 162:

> This section does not mean that whenever the court alters the charge after the commencement of the trial an accused person has an absolute right to recall and examine a witness. It only applies where the application to recall a witness has reference to the altered charges (see *Yeow Fook Yuen & Anor v R* [1965] 2 MLJ 81). In that event the examination of the witness must be confined to the alteration in the charge. As Martineau J said in *Hazara Singh & Others v Emperor* AIR 1926 Lah 60 at p 61:
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> > The right is thus not restricted to the re-calling of those witnesses only who have deposed to the subject matter of the alteration or amendment in the charge. The other witnesses also may conceivably be in a position to depose to facts in connection with such alteration or amendment. All that the court can do is to restrict the examination of the witness to the alteration or amendment in the charge.
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> When the section applies it is mandatory to allow witnesses to be recalled even if the alteration has not prejudiced the accused. In this regard I refer to *Nagendra Nath Sen v Emperor* AIR 1932 Cal 486 where Pearson and Mc Ghose JJ said at p 487:
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> > It may be that the alteration did not in fact prejudice the accused in any way, but it is to be observed that s 231 of the Criminal PC does not leave any discretion to the trying magistrate. The section is mandatory. It states that in a case of an alteration after the commencement of the trial the accused shall be allowed to recall or re-summon and examine any witness who may have been examined.

[26] Our examination of the notes of proceedings does not show any application being made and refused. Instead, after the learned trial judge dismissed the objection of the amendment being prejudicial to the defence, counsel proceeded after the amendment to make submissions as at the end of the prosecution case, when there is nothing to prevent the defence from making application to recall witnesses.

[27] We note the learned trial judge did not advise counsel the defence had the right to recall witnesses or call further witnesses. He did not have any obligation to do so. In *Azhar bin Che Wil v Public Prosecutor* [2010] 6 MLJ 22; [2010] 8 CLJ 905 (FC) the Federal Court had this to say:

> [30] The only complaint by Mr Karpal Singh was that had the charge been amended, the accused would have had the opportunity to recall or re-summon and examine any witness and to call further evidence which may be material to his defence. But we are of the view that even without the charge being amended, the 1st accused is not precluded from recalling or re-summons any witness or to call for further evidence. Cases have shown that even if a charge is amended, but where an accused person is represented by counsel, the trial judge is not obliged to inform the accused person of his right under s 162 to recall any of the witnesses for the prosecution. In *Moosa Abdul Rahman v The State of Kerala* [1982] Cr LJ 1384, the full bench of the High Court of Kerala held that s 217 of the Indian Criminal Procedure Code 1974 (which is in pari materia with our s 162):
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> > … does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses … or to call any further witnesses. The omission of the court to 'enquire of the prosecution or the accused whether they would like to exhercise the right of re-calling or re-summons the witnesses would not result in any procedural illegality'.
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> [31] The above proposition was accepted by the Court of Appeal in *Msimanga Lesaly*. Gopal Sri Ram JCA (as he then was) held that where an accused is represented by counsel it is unnecessary for the court to draw counsel's attention to s 162 of the Criminal Procedure Code or to inquire whether counsel intends to exhercise the right conferred by the section.
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> [32] We endorsed the above view. …

[28] We return to the objection made that the amendment prejudice the accused persons. However, no explanation was given as to what the prejudice was. There was nothing put before the court, not only for the judge to consider, but also the prosecution to answer as to whether there was in fact prejudice to the accused. We find no error in the learned trial judge rejecting the objection.

DEFENCE NOT FULLY CONSIDERED

[29] It was submitted that the learned judge had placed the wrong burden upon the defence. Counsel referred to RR36 where the learned trial judge said:

> 75. … Jika pembelaan kedua-dua OKT dan juga keterangan SD4 menyakinkan mahkamah atas imbangan kebarangkalian maka mahkamah tiada pilihan melainkan melepaskan dan membebaskan mereka.

[30] Closer examination of the grounds of judgment shows that at para 75 the learned trial judge had first correctly directed himself upon *Mohammad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 (SC). In that case, it was held that:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the judge but rather the actual application of the test to the facts of the case. In this case, the learned judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[31] Though no reference was made to it, in *Mohamed Yatin bin Abu Bakar v Public Prosecutor* [1950] 1 MLJ 57; [1949] 1 LNS 50 (HC), Spenser Wilkinson J had held:

> In this country, at the close of the case for the prosecution the court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt.

[32] Then the learned trial judge considered the defence against the totality of the evidence of other witnesses and their credibility before concluding at para 90 of the grounds of judgment at RR42 that:

> Di akhir perbicaraan kes, setelah meneliti keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan dan pihak pembelaan, mahkamah berpuashati bahawa pihak pembelaan telah gagal untuk menimbulkan keraguan

yang munasabah terhadap kes pendakwaan. Oleh itu OKT1 dan OKT2 didapati bersalah dan disabitkan seperti pertuduhan di bawah s 302 Kanun Keseksaan dibaca bersama s 34 Kanun yang sama.

[33] It was submitted that it was put to SP4 that he took a piece of wood but he denied. The relevant passage is at RR71:

S: Semasa simati, kamu, OKT2, Hussein, kamu juga ambil kayu memukul simati tapi OKT2 telah menahan kamu.

J: Tidak.

S: Bila kamu marah sebelum kamu sempat buat apa-apa OKT2 ada tahan kamu.

J: OKT2 tak buat apa-apa.

S: Ada seorang lagi bernama Mohd Zaidi di situ.

J: Ya.

S: Motosikal yang kamu naik pergi ke tempat kejadian motosikal siapa.

J: Motosikal Mohd Zaidi.

S: Mohd Zaidi juga sampai sebelum simati sampai ke rumah kamu.

J: Ya.

S: Bila sampai di dewan, simati ada kata kepada kamu ia lapar.

J: Tidak.

S: Bila sampai di dewan belia, apa simati buat.

J: Ia berdiri.

Cadangan

S: Selepas ia turun, ia ada beritahu ia lapar. Kemudian ia beri duit untuk beli roti dan soya bean.

J: Saya ikut Hussein pergi kedai beli air soya bean dan air mineral.

S: Itu atas permintaan simati.

J: Ya.

[34] We reproduced this at some length since the passage shows the submission is somewhat out of context. Even if it is true SP4 picked up a piece of wood, it was well before the time at the scene of crime. It was the defence case that having arrived, SP4 was asked to buy food and drink which he did. Then he came back. Then as in the passage quoted at para 17 above, he slapped the deceased once. Then the defence case continued to be laid out in the cross-examination of SP4 as follows:

S: Bila dia tuduh kamu.

J: Di rumah saya. Saya dituduh lagi di tempat kejadian.

S: Selepas berapa lama berada di situ ia tuduh awak lagi.

J: Tak ingat. Simati lawan biasa sahaja.

S: Kamu melihat tidak semua yang telah berlaku di tempat kejadian.

J: Ya.

S: Kamu ada melihat kayu, kamu tak tahu dari mana datangnya kayu ini.

J: Ya.

S: Keadaan tempat kejadian huru hara dan bising.

J: Ya.

[35] Then the cross-examination continued:

Cadangan

S: Sebenarnya kamu tak pasti siapa yang memukul simati.

J: Saya pasti dia orang yang pukul. …

S: Kamu tidak beritahu keluarga simati ia telah dipukul.

J: Ya.

S: Siapa orang terakhir keluar dari tempat kejadian.

J: Tak tahu.

[36] We found that from para 50 of the grounds of judgment, the learned trial judge recounted the defence case and the evidence of Rosli ('SD1'), Kamal ('SD2'), Khatijah bt Abdul Hamid Samy ('SD3') and SD4 Hussein bin Abd Hamid ('SD4'), proceeded to summarise the core of the defence at para 74 and set out the reasoning from paras 75–89, before arriving at his decision at para 90.

[37] Considering the grounds from para 50 onwards, we can find not reason to hold that the learned judge had in fact misdirected himself and, therefore, erred by applying the wrong standard of proof. We hold, therefore, that the line quoted at para 29 above from the second part of para 75 of the grounds of judgment was not an error that, applying *Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1 (CA) cannot be rectified under s 422 of the Criminal Procedure Code.

[38] Kamal's sister Khatijah whom the deceased was alleged to have molested is also the sister of Rosli. Although Rosli was not with Kamal when Kamal was first informed by one Roslan of the alleged molesting Khatijah, and had beaten the deceased, the evidence showed that when he arrived after being called by

Hussin, he had immediately proceeded to kick the stomach of the deceased until the deceased fell down. When Rosli arrived, Kamal was still beating the deceased. According to the evidence of SP4, Rosli continued to punch the deceased for about 20 minutes. Then he left but came back three minutes later with a piece of wood. Clearly it must be inferred he was not satisfied with kicking and punching and left only to get a piece of wood. Rosli hit the deceased on the head. He looked angry, asked the deceased to show his hand which Rosli then hit, causing the deceased to cry out in pain. The evidence showed the beating by Rosli and Kamal continued for about two hours.

[39] In this case, the common intention went beyond the common intention of a 'vicarious' nature as explained in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 7 LNS 654 as the evidence shows that though it was Kamal who began with beating, Rosli had come and actively participated together with Kamal to beat the deceased.

[40] The evidence also showed it was not one of them but both Rosli and Kamal had hit the deceased with the piece of wood, causing the head injuries that led to the death of the deceased.

[41] In the circumstances, we find that the High Court did not err in law, principle or in any finding of fact in arriving to its decision to find both appellants guilty as charged and to convict and sentence the appellants thereon. We, therefore, dismiss the appeal and affirmed the conviction and sentence passed by the High Court.

Appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar